IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 429 of 2001

For Approval and Signature:

HONOURABLE MR.JUSTICE J.M.PANCHAL

HONOURABLE MR.JUSTICE H.B.ANTANI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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HANSABEN W/O RAJENDRAKUMAR BHAGVATISHANKAR BHATT & 1 - Appellants

Versus

STATE OF GUJARAT - Respondent

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Appearance :
MR Shakeel A.Qureshi for Appellants.
MR KT DAVE, A.P.P. for respondent.
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CORAM : HONOURABLE MR.JUSTICE J.M.PANCHAL
and
HONOURABLE MR.JUSTICE H.B.ANTANI

Date : 15/12/2005

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE J.M.PANCHAL)

Instant appeal filed under Section 374(2) of the Code of Criminal Procedure, 1973, is directed against

judgment dated May 4, 2001, rendered by the learned Special Judge (N.D.P.S.), Nadiad, in Special (N.D.P.S.) Case Nos.16 of 1999 and 3 of 2000, by which the two appellants are convicted under Section 20(b)(ii) of the Narcotic Drugs and Psychotropic Substances Act, 1985 [“the Act” for short] and each sentenced to R.I. for ten years and fine of Rs. 1 Lakh, in default, S.I. for two years.

2. The facts emerging from the record of the case are as under:

Mr.Pravin Sinha, who was D.S.P. Anand, received an anonymous letter dated December 9, 1998 mentioning, inter alia, that Rajubhai Bhagatlal (appellant No.2 herein) residing in Ghiya Pole, opposite Lambi Auto is dealing in charas and bringing charas from Borsad and Petlad to Khambhat on his Scooter bearing Registration No.GJU-3156, whereas his wife is selling charas from the house and if Scooter bearing Registration No.GJU-3156 is intercepted near Dharmaj Cross-Roads, a big quantity of charas could be seized. On receipt of the anonymous letter, the D.S.P. forwarded the same to P.I. Mr.H.C.Pathak for verification. P.I.Mr.Pathak, in turn, handed over the anonymous letter to PSI Mr.P.M.Bhaliya to ascertain

whether facts stated in the letter were correct. On verification, PSI Mr.Bhaliya learnt from his informer that some of the contents of the letter were true and that Rajendrakumar Bhagatshanker Bhatt was dealing in charas. On receipt of information from his informant, PSI Mr.Bhaliya reduced the same into writing by posting entry in station-diary maintained at the police station. PSI Mr.Bhaliya also conveyed the information received by him to P.I. Mr.Pathak. After receipt of information by PI Mr.Pathak from PSI Mr.Bhaliya, Mr.Pathak decided to arrange a raid. He asked constable Mavsinh Jamsinh to summon two panch witnesses. Accordingly, two panchas, namely, (1) Ramanbhai Chhaganbhai Baria, and (2) Popatbhai Gordhanbhai Valmik were summoned. P.I. Mr.Pathak ascertained from the two persons summoned whether they were ready to act as panch witnesses. The persons summoned expressed their willingness to act as panch witnesses. Therefore, they were conveyed the information received by P.I. Mr.Pathak. Necessary articles, such as, seal, twine, wax etc. were collected for the purpose of sealing the contraband article, if found. Thereafter, P.I. Mr.Pathak, in the company of panch witnesses, proceeded to the house of the appellant No.2 at about 23.00 hours. At that time, appellant No.2

was not present in the house, but his wife Ms.Hansaben, who is appellant No.1 herein, was present. P.I. Mr.Pathak introduced himself to the appellant No.1 and conveyed information received by him to her. P.I. Mr.Pathak told the appellant No.1 that it was necessary to search her house. Before effecting search of the house, P.I. Mr.Pathak offered the appellant No.1 to carry out search of her house either in presence of a Magistrate, or a Gazetted Officer, but, the said offer was declined by the appellant No.1. Thereupon, house of the appellants was searched, which resulted into find of 241 grams & 850 milligrams of charas. P.I. Mr.Pathak called upon the appellant No.1 to produce pass or permit authorising her to possess charas, but, none could be produced by the appellant No.1. P.I. Mr.Pathak completed second part of panchnama in presence of panch-witnesses. It may be stated that other articles were also found and seized. Out of quantity of charas found, sample was prepared and sealed. PSI Mr.Bhaliya lodged his complaint. P.I. Mr.Pathak forwarded complaint of Mr.Bhaliya, panchnama, muddamal etc. to P.S.O. of the Police Station. On the basis of complaint of PSI Mr.Bhaliya, offences were registered against the appellants. The appellant No.1 herein was arrested from the spot, whereas appellant No.2

was found absconding. Investigation into the case was made by P.I. Mr.Pathak. He recorded statements of those persons who were found to be conversant with the facts of the case. The muddamal seized was sent to Forensic Science Laboratory for analysis. The report of analysis indicated that the substance analysed was charas within the meaning of the Act. On completion of investigation, the appellant No.1 was chargesheeted in the Court of learned Special Judge (N.D.P.S.), Nadiad, on the basis of which Special (N.D.P.S.) Case No.16 of 1999 was registered against her. After submission of chargesheet against the appellant No.1, the appellant No.2 was arrested on January 25, 2000 and, therefore, supplementary chargesheet was filed against him, on the basis of which Special (N.D.P.S.) Case No.3 of 2000 was registered against him.

3. The learned Special Judge (N.D.P.S.), Nadiad framed necessary charge against the appellants at Exh.5 for commission of offences punishable under Sections 20(b), 22 r.w.section 29 of the Act. The charge was read over and explained to the appellants, who pleaded not guilty to the same and claimed to be tried. The prosecution, therefore, examined (1) Jentilal Thakorlal Soni as PW.1

at Exh.9, (2) Bhikhubhai Jamalbhai Shakariyani, who was working as a Clerk in Tax Department of Khambhat Municipality as PW.2 at Exh.10, (3) Deputy Mamlatdar Shaileshkumar Madhubhai Shah as PW.3 at Exh.13, (4) Panch Popatbhai Gordhanbhai as PW.4 at Exh.15, (5) PSI Prakashbhai Mohanlal Bhaliya as PW.5 at Exh.19, (6) P.S.O. Savsing Jitarabhai Palas as PW.6 at Exh.23, (7) Panch Ramanbhai Chhaganbhai Baria as PW.7 at Exh.24, (8) PI Mr.Himanshu Chandravadan Pathak as PW.8 at Exh.26, (9) police constable Bhailalbhai Rameshbhai as PW.9 at Exh.41, (10) Unarmed Police Constable Ashwinbhai Manibhai Chauhan as PW.10 at Exh.43, (11) child witness Hardik Rajendrakumar Bhatt, who is son of the appellants as PW.11 at Exh.44, and (12) Circle Police Inspector Fatesinh Sahebsinh Khant as PW.12 at Exh.46, to prove its case against the appellants. The prosecution also produced documentary evidence, such as: extract of property register indicating that the house raided was registered in the name of father of the appellant No.2 herein, at Exh.12, voters' list indicating that the appellant No.2 herein was residing in the house raided at Exh.14, another extract of list of voters at Exh.14, panchnama of search of house of the appellants and find of charas weighing 241.850 grams at Exh.16, information

received by PSI Mr.Bhaliya at Exh.20, entry indicating that information received by Mr.Bhaliya was reduced into writing at Exh.21, complaint lodged by Mr.Bhaliya at Exh.22, forwarding letter with which panchnama, complaint of Mr.Bhaliya, muddamal etc. were produced before P.S.O. at Exh.29, report made by Mr.Pathak to his immediate superior officer as required by Section 57 of the Act at Exh.34, grounds of arrest communicated to the appellants at Exh.35, report of analysis at Exh.39 etc. in support of its case against the appellants.

4. After recording of evidence of prosecution witnesses was over, the learned Special Judge explained to the appellants the circumstances appearing against them in the evidence of the prosecution witnesses and recorded their further statements as required by Section 313 of the Code of Criminal Procedure, 1973. In their further statements, the appellants claimed that a false case was foisted upon them by the police. However, no defence evidence was led by any of them to substantiate the said claim.

5. On appreciation of evidence adduced by the prosecution, the learned Judge held that it was proved by the prosecution beyond reasonable doubt that charas

weighing 241 grams & 850 milligrams was found from the house belonging to the appellants, without pass or permit and, therefore, they were liable to be convicted for commission of offence punishable under Section 20(b) of the Act. The learned Judge noticed that mandatory provisions of Sections 42 & 50 of the Act were complied with and, therefore, the appellants were not entitled to any benefit of doubt. The learned Judge held that the sample drawn had reached F.S.L. intact and there was no possibility of tampering with the same. In view of abovereferredto conclusions, the learned Judge has convicted the appellants under Section 20(b) of the Act and imposed sentence referred to earlier by judgment dated May 4, 2001, giving rise to instant appeal.

6. It may be stated that the appellants were earlier represented by their learned Lawyer M/s.K.K.Pande and K.B.Pande of Baroda. During the pendency and final disposal of the appeal, Criminal Misc. Application No.13690 of 2005 was filed by the appellant No.1 herein requesting the Court to enlarge her on temporary bail to enable her to make payment of Rs.20,000/- to her Lawyer. While hearing the said application, a direction was given to the Jail Superintendent, Central Jail, Baroda to produce the appellant No.1 herein before the Court.

Accordingly, she was produced before the Court and after ascertaining her wishes, Mr.Shakeel A.Qureshi, learned advocate practising in this Court was requested to render free legal assistance to the appellants, as the appellants were not able to pay fees to the lawyer engaged by them. Accordingly, Mr.Shakeel A.Qureshi has rendered competent free legal assistance to the appellants.

7. Mr.Shakeel A.Qureshi, learned counsel of the appellants, contended that the provisions of Section 42 as well as Section 50 of the Act are not complied with and, therefore, the judgment impugned in the appeal should be reversed. It was argued that no satisfactory evidence could be adduced by the prosecution indicating that muddamal sample drawn was sealed as required by law and, therefore, unwarranted conviction of the appellants under Section 20(b) of the Act should be set aside. What was asserted by the learned counsel of the appellants was that it could not be proved by the prosecution that after the sample was drawn, the same was kept in safe-custody so as to rule out tampering with the same and, therefore, the appeal should be accepted. The learned counsel of the appellants asserted that the evidence on record has not been appreciated by the learned Judge of the trial Court

in its true perspective and, therefore, the appeal should be allowed.

8. Mr.K.T.Dave, learned A.P.P.for the State, contended that as held by the learned Judge of the trial Court all the mandatory provisions of the Act have been complied with and, therefore, the judgment impugned in the appeal deserves to be upheld. It was argued that the evidence on record satisfactorily establishes that the muddamal seized was properly sealed and had reached the Laboratory intact and, therefore, the plea that there was possibility of tampering with the muddamal should not be accepted by the Court. The learned counsel emphasised that cogent and convincing reasons have been assigned by the learned Judge of the trial Court for convicting the appellants under Section 20(b) of the Act, and as the learned counsel of the appellants has failed to dislodge those weighty reasons, the appeal, which has no merits, should be dismissed.

9. This Court has heard Mr.Shakeel A.Qureshi, learned counsel of the appellants and Mr.K.T.Dave, learned Additional Public Prosecutor for the State, at length and in great detail. This Court has also undertaken a complete and comprehensive appreciation of all vital

features of the case as well as the entire evidence on record with reference to broad and reasonable probabilities of the case.

10. From the case of the prosecution, it is evident that the whole raid was arranged by P.I. Mr.Pathak after receipt of information from PSI Mr.Bhaliya. It is worth mentioning that P.I. Mr.Pathak is a Gazetted Officer and also an empowered officer within the meaning of Section 41(2) of the Act in view of Notification No.GH-L.14-NDPS-1087(i)-M, dated 15th June, 1987 issued by the Government of Gujarat, in exercise of powers conferred by sub-section(2) of Section 40 of the Act. Therefore, it was necessary for P.I. Mr.Pathak to comply with the provisions of Section 41(2) of the Act. Section 41(2) of the Act, inter alia, provides that if a Gazetted Officer, who is also an empowered officer, receives information regarding commission of offence punishable under the Act, he shall reduce the information into writing. Neither the evidence of Mr.Pathak, nor any of the documents produced on the record indicates that the information received by P.I. Mr.Pathak was reduced into writing. Thus, there is no manner of doubt that breach of mandatory provisions of Section 41(2) of the Act was committed by P.I. Mr.Pathak. This breach would entitle the appellants to acquittal.

The Court further finds that though PSI Mr.Bhaliya was examined at Exh.19 and P.I. Mr.H.C.Pathak was examined at Exh.26 to prove the case of the prosecution, none of the police officers has mentioned in his substantive evidence before the Court as to how the muddamal drawn was sealed. Thus, there is absence of evidence to establish that muddamal seized was properly sealed. The panchnama prepared at the time of seizure of charas from the house of the appellants indicates that on the sample, seal bearing inscription of “Police Inspector, Khambhat City” was applied. However, the letter addressed by the competent authority of F.S.L. to the Police Inspector, Khambhat City Police Station, District : Anand after receipt of muddamal sample for analysis indicates that the sample was bearing the seal having impression of “Police Inspector, Rural, Khambhat City”. It means that the sample, which was sealed after seizure, had not reached the Laboratory for analysis and another sample was sent for analysis. It is relevant to notice that neither PSI Mr.Bhaliya, nor P.I. Mr.Pathak, nor panch witness Ramanbhai Chhaganbhai Baria, examined at Exh.24, has stated that six samples were placed in a cotton bag which was stitched. However, Exh.38 indicates that six samples were found in a cotton bag which was stitched. This discrepancy could not be explained by any of the

prosecution witnesses at all. At this stage, it would be relevant to notice the testimony of Unarmed Police Constable Ashwinbhai Manibhai Chauhan recorded at Exh.43. This witness has stated that he was handed over six sealed packets to be carried to F.S.L. Ahmedabad. He has not stated that he had carried those six sealed packets in a cotton bag which was stitched. Therefore, this Court is of the firm opinion that it is not satisfactorily proved by the prosecution that the muddamal sample which was seized and sealed at the house of the appellant was despatched to F.S.L. for analysis, which in turn, would make it very clear that the prosecution has failed to prove that the substance seized from the house of the appellants was charas within the meaning of the Act. It is further relevant to notice that Unarmed Police Constable Ashwinbhai in Para-2 of his testimony, has stated that the samples which he had carried to F.S.L. for analysis were bearing seal having impression of “Khambhat Police Station” and not of “Police Inspector, Khambhat City” as is mentioned in the panchnama. The discrepancy about application of seal on muddamal sample raises doubt about identity of sample sealed at the house of the appellants, and sent to F.S.L. for analysis. As noticed earlier, there is breach of mandatory provisions of Section 41(2) of the Act.

11. It may be mentioned that it was the case of the prosecution that the appellants had also committed offence punishable under Section 22 of the Act, regarding which charge was framed by the learned Judge. However, it is an admitted position that the alleged substance, which was found from the house belonging to the appellants, was not a psychotropic substance within the meaning of the Act and, therefore, the appellants could not have been charged for commission of offence punishable under Section 22 of the Act. Further, the case of the prosecution was also that the appellants had abetted each other in commission of offence punishable under the Act. However, no acceptable evidence could be produced by the prosecution to establish that the two appellants had abetted each other in commission of offence punishable under the Act.

12. On overall view of the matter, this Court is of the opinion that the prosecution has failed to bring definite evidence to establish its case against the appellants, and they are entitled to acquittal.

For the foregoing reasons, the appeal succeeds. Judgment dated May 4, 2001 rendered by the learned

Special Judge (N.D.P.S.), Nadiad, in Special (N.D.P.S.) Case Nos.16/1999 & 3/2000 convicting the appellants for commission of the offence punishable under Section 20(b) of the N.D.P.S.Act and sentencing each of them to R.I. for ten years and fine of Rs.1 Lakh, in default, S.I. for two years is hereby set aside. Instead, the appellants are acquitted. The respondent is directed to release the appellants from jail forthwith, unless presence of them or any of them is needed in jail with reference to any other case. Muddamal be disposed to in terms of directions given by the learned Judge in the impugned judgment.

[J.M.PANCHAL,J.]

[H.B.ANTANI,J.]

(Patel)